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REAL ESTATE MANAGEMENT BUREAU

Management Memo: SUMB 97-1-1 (AMENDED)

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Subject: POLICY FOR LICENSING STRUCTURES IN, OVER
BELOW OR ABOVE NAVIGABLE WATERWAYS

Updated by: LA

I. INTRODUCTION

The State of Montana holds ownership of the land and minerals located below the low water marks of navigable rivers and lakes as established in the Equal Footing Doctrine. The Department of Natural Resources and Conservation, Trust Land Management Division, administers these lands on behalf of the state.

The DNRC has responsibility for the determination of navigability, river boundaries, island formations, and mineral ownership.

II. AUTHORITY

The Department's authority to administer the ownership of navigable water bodies are referenced in the following:

1. Equal Footing Doctrine (1844)

Based on a U.S. Supreme Court decision (Pollard vs. Hagen 44 U.S. 212) the original 13 states held ownership of navigable riverbeds consistent with English Law. The Supreme Court held that all new states enter the union under equal footing. Therefore, all of the state's would own the lands beneath the navigable rivers and lakes.

2. MCA 70-16-201

Provides for state ownership from the low water mark to the low water mark on navigable water bodies.

3. MCA 70-1-202

Provides for state ownership of all land below the water of navigable lakes or streams.

4. MCA 77-1-102

All lands lying and being in and forming a part of the abandoned bed of any navigable stream or lake belongs to the State of Montana, for the School Trust.

5. MCA 70-18-203

Islands and accumulations of land formed in the beds of navigable streams belong to the State of Montana.

III. GOAL

The goal is to provide for the beneficial use of state lands for public and private purposes in a manner which will provide revenues without harming the long term capability of the land or restricting the original commercial navigability.

IV. OBJECTIVES

1. To seek fair market value for the issuance of all easements and licenses.
2. To issue an easement or license when it can be shown to be in the state's best interest.
3. To protect riparian areas or the navigable status of these water bodies.
4. To comply with the provisions of applicable state and federal laws.
5. To reduce duplicative permitting by DNRC and County Conservation Districts. This policy represents a revision of previous DNRC river licensing policy as it narrows the scope of projects which require DNRC authorization.

V. DEFINITIONS

Navigable: Any lake or streambed that has had a history of commercial use/navigation.

Ownership: The State of Montana owns the land between the low water marks under the navigable waters, the department administers this ownership.

Water Bodies: Any commercially navigable stream or lake.

Abandoned Bed: A former channel of a navigable stream or lake.

Low Water Mark: The lowest seasonal width of a lake or stream based on a typical flow rate or lowest seasonal mean elevation level.

<u>Land Use License:</u>	An agreement that allows a said activity to occur on the bed of navigable lake or stream for a prescribed rental and a term of ten (10) years or less, plus any protective stipulations to regulate such activity.
<u>Easement:</u>	An interest acquired in land that entitles the holder of the easement to a specified use or enjoyment. This interest shall remain in force as long as the specified use continues or is maintained.
<u>Fair Market Value:</u>	The most current appraised value of a property.
<u>Impact:</u>	An action or effect to the bed of a navigable lake or streambed as a result of a proposed activity.
<u>Stipulations:</u>	Protective conditions or clauses that mitigate potential impacts to the bed of a navigable lake or stream.
<u>124 Notice:</u>	The reference to the Streambed Preservation Act, which requires any state government, county, municipality, or other subdivision of the state to give notice to the Department of Fish, Wildlife and Parks of any project that could alter a natural stream and its banks.
<u>310 Permit:</u>	The reference to the Natural Streambed and Land Preservation Act, which requires (nongovernment) individuals or organizations to obtain a "310" permit before undertaking a project that would alter or modify a perennial stream.
<u>404 Permit:</u>	The reference to the Federal Water Pollution Control Act, which requires the approval of the Army Corps of Engineers, for the removal or placement of dredged or fill materials into waters, wetlands or seas within the United States.
<u>Accumulations:</u>	Any formation or collection of sediment that creates a land mass within a navigable lake or stream.

VI. EASEMENT, LEASE OR LICENSE REQUIREMENTS

The DNRC requires that an easement or license be acquired by the project proponent for the following structures in, over, below or above a navigable waterway.

1. Dams
2. Bridges
3. Utility lines
4. Pipelines
5. Drop structures used for irrigation
6. River channelization projects, including river barbs over 40' in length or greater than 10% of river channel width measured at low water.
7. All projects where the adjoining land is state owned.

8. Minerals - a lease must be acquired before mineral exploration or development involving lands under navigable rivers, abandoned channels, and on or under state owned islands.
9. Projects noticed by the Corps of Engineers 404 permit system which effect the navigability of a waterway. The DNRC will notify the Corp of Engineers and the Project Proponent of easement or license requirements in these instances.

The DNRC will rely on the County Conservation District 310 permitting process to authorize other navigable river projects including but not limited to the following activities:

1. Rip-rap and bank stabilization projects
2. Temporary gravel irrigation dams
3. River barbs under 40' or 10% of channel width
4. Excavations of less than 10 cubic yards of river bedload accumulation
5. Tree and debris removal not associated with a timber sale
6. Repair and maintenance to existing irrigation structures, and irrigation pump sites.
7. Installation and maintenance of floating irrigation pumps
8. Private boat ramps, wharves and docks.

Pursuant to §85-16-101, wharves and docks shall extend into navigable waters such a distance only as may be necessary to permit boats to safely land and take on and discharge passengers and cargo. In order to establish an acceptable distance for extension of such wharves and docks into a navigable waterway, the DNRC will determine the annual mean low-water mark of the navigable waterway then measure twice the depth of the draft of the boat(s) to be used. A wharf or dock may proceed that distance into the navigable waterway without charge or permit. Beyond that distance, the DNRC has the discretion to require an easement, lease or license.

Projects not described above will be reviewed on a case by case basis by the appropriate DNRC Area Office to determine whether an easement, lease or license is necessary.

VII. PROCEDURES

1. The party requesting a Land Use License or Easement shall submit the appropriate standardized DNRC application and non-refundable application fee, plus the Application Form for Licensing Structures and Improvements on Navigable Water Bodies (DS-432) to the appropriate Area Land Office. This application will require a map showing legal description of project, name of the water body involved, names and locations of adjoining property owners in vicinity of proposed project, type of structure(s) involved, type of materials in the structure, estimated longevity of the project and its associated structures, and a general discussion outlining the need for the project. Easements will require a legal survey completed by a Licensed Land Surveyor or Registered Professional Engineer.
2. The Area Land Office shall conduct a field investigation if necessary and file the appropriate environmental document to determine the project's impact to state-owned land as well as the impact to the future navigability of the water body. This field investigation shall consider determining impacts to: 1) the water resource (water quality and quantity, fisheries, flora); 2) bank and bed stability; 3) recreational and navigational uses.

3. If a Land Use License is to be issued, the rental shall be based on a minimum annual payment of \$100.00 plus filing fee. The maximum term for licenses will be 10 years but the Department may issue a Land Use License for a shorter duration. At the end of the original 10 year license, the licensee may request renewal of the license for an additional term of up to 10 years. However, the structure must be for the original use and in the original location. The licensee shall contact the Department to request a renewal at least 30 days prior to the expiration of the license. The department may require payment of additional fees or bonds and impose new stipulations as condition of renewal. The Land Use License shall be completed by the Area Office and forwarded, upon payment of fees and bonds, to the applicant and a copy sent to the Special Use Bureau. Licenses are typically issued for river barbs, removal of bedload accumulation, channelization projects and some diversion structures.
4. If an easement is to be issued, then the procedures under "Easement Granting Procedures" shall be followed. The Area Office will prepare a report and recommendation on proposed project including construction and/or operating stipulations, bonding, notification of appropriate state and federal agencies, damage fees, other required permits such as 124, 310 or 404, and reclamation. The staff of the Real Estate Management Bureau will evaluate the proposed project and the Area Land Office report and make the final determination as to compensation to the School Trust and set final stipulations. MEPA compliance will be reviewed and augmented as necessary. Easements are typically issued for dams, bridges, pipelines, utility lines, and some diversion structures. In the case of diversion structures, the type of structure, its permanency, effect on navigability, and potential for liability will determine whether a license or easement is issued.
5. The Area Office will monitor the easement and/or land use license for compliance with construction stipulations. If problems or noncompliance of stipulations are found, then a mitigation plan may be required of the applicant by the Department.

**NAVIGABLE WATER WAYS OWNED BY
THE STATE OF MONTANA AND ADMINISTERED BY
THE DEPARTMENT OF STATE LANDS**

BIG HOLE RIVER

Based on historical documentation, the Big Hole River is commercially navigable from Steel Creek to Divide, Montana. Therefore, the state claims ownership of the Big Hole River between these two points.

BIG HORN RIVER

Based on historical documentation, the Big Horn River is commercially navigable from the Wyoming state line to its confluence with the Yellowstone River. Therefore, the state claims ownership of the Big Horn River between these two points.

BITTERROOT RIVER

Based on historical documentation, the Bitterroot River is commercially navigable from the confluence of its east and west forks to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Bitterroot River between these two points.

BLACKFOOT RIVER

Based on historical documentation, the Blackfoot River is commercially navigable from Lincoln, Montana to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Blackfoot River between these two points.

BOULDER RIVER (Tributary to the Yellowstone River)

Based on historical documentation, the Boulder River is commercially navigable from the northern township line of Township 6 South, Range 12 East, to its confluence with the Yellowstone River. The west Boulder River is commercially navigable from the southern line of Township 3 South, Range 11 East, to its confluence with the main stem of the Boulder River. Therefore, the state claims ownership of the Boulder River between these points.

BULL RIVER

Based on historical documentation, the Bull River is commercially navigable from a point south of Bull Lake to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Bull River between these two points.

CLARK FORK RIVER

Based on historical documentation, the Clark Fork River is commercially navigable from Deer Lodge, Montana to the Idaho state line. Therefore, the state claims ownership of the Clark Fork River between these two points.

CLEARWATER RIVER

Based on historical documentation, the Clearwater River is commercially navigable from, and including, Seeley Lake, to its confluence with the Blackfoot River. Therefore, the state claims ownership to Seeley Lake and the Clearwater River between these two points.

DEARBORN RIVER

Based on historical documentation and court adjudication, the Dearborn River is commercially navigable from Highway 434 to its confluence with the Missouri River. Therefore, the state claims ownership of the Dearborn River between these two points.

DUPUYER CREEK

See "South Fork Dupuyer Creek".

FLATHEAD RIVER - MAIN STEM

Based on historical documentation, the main stem of the Flathead River is commercially navigable from the confluence of its north and middle forks to its confluence with the Clark Fork River. However, given Neman court case, the state does not claim any river ownership within the boundaries of the Flathead Indian Reservation at this time. Therefore, the state claims ownership of the main stem of the Flathead River from the western boundary of the Flathead Indian Reservation to its confluence with the Clark Fork River.

FLATHEAD RIVER - MIDDLE FORK

Based on historical documentation, the middle fork of the Flathead River is commercially navigable from three (3) miles above Nyack, Montana to its confluence with the North fork of the Flathead River. Therefore, the state claims ownership of the middle fork of the Flathead River between these two points.

FLATHEAD RIVER - NORTH FORK

Based on historical documentation, the north fork of the Flathead River is commercially navigable from Logging Creek to its confluence with the main stem of the Flathead River. Therefore, the state claims ownership of the north fork of the Flathead River between these two points.

FLATHEAD RIVER - SOUTH FORK

Based on historical documentation, the south fork of the Flathead River is commercially

navigable from the face of Hungry Horse Dam to the main stem of the Flathead River. Therefore, the state claims ownership of the south fork of the Flathead River between these two points.

FORTINE CREEK (Tributary to Tobacco River)

Based on historical documentation, Fortine Creek is commercially navigable from Swamp Creek to its confluence with the Tobacco River. Therefore, the state claims ownership of Fortine Creek between these two points.

GALLATIN RIVER

Based on historical documentation, the Gallatin River is commercially navigable from Taylor's Fork to Central Park, Montana. Therefore, the state claims ownership of the Gallatin River between these two points.

GRAVES CREEK (Tributary to Tobacco River)

Based on historical information and Departmental interpretation, Graves Creek is commercially navigable from where Graves Creek intersects the eastern township line of Township 35 North, Range 26 West, to its confluence with the Tobacco River. Therefore, the state claims ownership of Graves Creek between these two points.

JEFFERSON RIVER

Based on historical documentation, the Jefferson River is commercially navigable from its confluence of the Beaverhead and Ruby Rivers to the Jefferson's confluence with the Missouri River. Therefore, the state claims ownership of the Jefferson River between these two points.

KOOTENAI RIVER

Based on historical documentation, the Kootenai River is commercially navigable from the Canadian line to the Idaho state line. Therefore, the state claims ownership of the Kootenai River between these two points.

LOLO CREEK

Based on historical documentation, Lolo Creek is commercially navigable from the mouth of Tevis Creek to Lolo Creek's confluence with the Bitterroot River. Therefore, the state claims ownership of Lolo Creek between these two points.

MADISON RIVER

Based on historical documentation, the Madison River is commercially navigable from the confluence of its west fork to Varney, Montana. Therefore, the state claims ownership of the Madison River between these two points.

MARIAS RIVER

Based on historical documentation, the Marias River is commercially navigable from its confluence with the Missouri River to a point five miles upstream. Therefore, the state claims ownership of the Marias River between these two points.

MILK RIVER

Based on historical documentation, the Milk River is commercially navigable from Glasgow to its confluence with the Missouri River. Therefore, the state claims ownership of the Milk River between these two points.

MISSOURI RIVER

Based on historical documentation, the Missouri River is commercially navigable from its headwaters at Three Forks, Montana to the North Dakota state line. Therefore, the state claims ownership of the Missouri River between these two points.

NINE MILE CREEK (Tributary to the Clark Fork River)

Based on historical documentation, Nine Mile Creek is commercially navigable from the southeast corner of Township 17 North, Range 24 West, to its confluence with the Clark Fork River. Therefore, the state claims ownership of Nine Mile Creek between these two points.

ROCK CREEK (Tributary of the Clark's Fork of the Yellowstone River)

Based on historical documentation, Rock Creek is commercially navigable from the main fork of Rock Creek to Red Lodge, Montana. Therefore, the state claims ownership of Rock Creek between these two points.

SHEEP CREEK (Tributary to Smith River)

Based on historical documentation, Sheep Creek is commercially navigable from the mouth of Deadman Creek to its confluence with the Smith River. Therefore, the state claims ownership of Sheep Creek between these two points.

SMITH RIVER

Based on historical documentation, the Smith River is commercially navigable from the mouth of Sheep Creek to its confluence with the Missouri River. Therefore, the state claims ownership of the Smith River between these two points.

SOUTH FORK DUPUYER CREEK (Tributary to Dupuyer Creek and Marias River)

Based on historical documentation, the south fork of Dupuyer Creek is commercially navigable from the basins above the canyon to the mouth of the canyon, a distance of approximately eight miles. Therefore, the state claims ownership of the south fork of Dupuyer Creek between these two points.

STILLWATER RIVER

Based on historical documentation, the Stillwater River is commercially navigable from upper Stillwater Lake to its confluence with the Flathead River. Therefore, the state claims ownership of the Stillwater River between these two points.

SUN RIVER

Based on historical documentation, the Sun River is commercially navigable from the confluence of the north and south forks of the Sun River to its confluence with the Missouri River. Therefore, the state claims ownership of the Sun River between these two points.

SWAN RIVER

Based on historical documentation, the Swan River is commercially navigable from and including Swan Lake to its confluence with Flathead Lake. Therefore, the state claims ownership of the Swan River between these two points.

TETON RIVER

Based on historical documentation, the Teton River is commercially navigable from the confluence of its north fork to its confluence with the Marias River. Therefore, the state claims ownership of the Teton River between these two points.

TOBACCO RIVER

Based on historical documentation, the Tobacco River is commercially navigable from the mouth of Graves Creek to its confluence with the Kootenai River. Therefore, the state claims ownership of the Tobacco River between these two points.

TONGUE RIVER

Based on historical documentation, the Tongue River is commercially navigable from the south line of Township 2 South, Range 44 East to its confluence with the Yellowstone River. Therefore, the state claims ownership of the Tongue River between these two points.

WHITEFISH RIVER

Based on historical documentation, the Whitefish River is commercially navigable from, and including, Whitefish Lake to its confluence with the Stillwater River. Therefore, the state claims ownership of the Whitefish River between these two points.

YAAK RIVER

Based on historical documentation, the Yaak River is commercially navigable from the mouth of Fourth of July Creek to its confluence with the Kootenai River. Therefore, the state claims ownership of the Yaak River.

YELLOWSTONE RIVER

Based on historical documentation, the Yellowstone River is commercially navigable from Emigrant Gulch at Emigrant, Montana to the North Dakota state line. Therefore, the state claims ownership of the Yellowstone River between these two points.